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No. 01-1269

IN THE

Supreme Court of the United States

CITY OF CUYAHOGA FALLS, *et al.*,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL FAIR HOUSING ALLIANCE, AARP, THE CATHOLIC COMMISSION OF SUMMIT COUNTY, OHIO AND THE NORTHEAST OHIO AMERICAN FRIENDS SERVICE COMMITTEE IN SUPPORT OF RESPONDENTS

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39 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	2
I. THE LOWER COURT PROPERLY REVERSED THE GRANT OF SUMMARY JUDGMENT TO PETITIONERS	5
A. The Evidence, Viewed Most Favorably To Respondents, Would Support A Finding Of Intentional Discrimination By City Officials	6
B. The Discriminatory Motives Of Citizens Are Relevant To Determining Whether Officials Sought To Give Effect To Those Motives	12
C. Consideration Of Citizen Comments Does Not Threaten Any First Amendment Rights	14
1. The Governing Evidentiary Framework Protects The City From Improper Imputation Of Discriminatory Animus	14
2. Considered Within The Governing Framework, Protected Speech May Be Used As Evidence Of Discriminatory Intent	16
II. THIS CASE DOES NOT PRESENT THE QUESTION WHETHER LIABILITY UNDER THE FHA MAY BE BASED ON DISPARATE IMPACT	20
III. DISPARATE IMPACT IS A VALID BASIS FOR IMPOSING LIABILITY UNDER THE FHA	22

TABLE OF CONTENTS – continued

Page

A. The Text And Purpose Of The FHA Compel The Conclusion That It Permits A Finding Of Liability Based On Disparate Impact Analysis.. 23

B. The Legislative History Confirms That Congress Intended To Provide A Disparate Impact Claim Under The FHA 25

C. The Fair Housing Amendments Act Of 1988 Tacitly Approved Disparate Impact Analysis.... 27

D. Administrative Implementation Of The FHA Supports A Disparate Impact Standard 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

Bangerter v. *Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995)..... 24

Betsey v. *Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984)..... 24, 25

Bowen v. *American Hosp. Ass'n*, 476 U.S. 610 (1986) 6

Buchanan v. *Warley*, 245 U.S. 60 (1917)..... 12, 26

Buckeye Cmty. Hope Found. v. *City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001), *pet. granted*, 70 U.S.L.W. 3788 (U.S. June 24, 2002) (No. 01-1269)..... 15

Cannon v. *University of Chi.*, 441 U.S. 677 (1979) 27

City of Cleburne, Tex. v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) 12, 14, 19

Connecticut v. *Teal*, 457 U.S. 440 (1982) 21

Crawford v. *Board of Educ.*, 458 U.S. 527 (1982) 17

Dothard v. *Rawlinson*, 433 U.S. 321 (1977)..... 21

Edelman v. *Lynchburg Coll.*, 122 S. Ct. 1145 (2002) 27, 28

General Bldg. Contractors Ass'n v. *Pennsylvania*, 458 U.S. 375 (1982) 24

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 21, 23

Hanson v. *Veterans Admin.*, 800 F.2d 1381 (5th Cir. 1986)..... 24, 25

Haupt v. *United States*, 330 U.S. 631 (1947)..... 18

Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) 23

Holmes Group, Inc. v. *Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889 (2002)..... 23

TABLE OF AUTHORITIES – continued

	Page
Huntington Branch, NAACP v. *Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988)	24
Jackson v. *Okaloosa County, Fla.*, 21 F.3d 1531 (11th Cir. 1994)	24
James v. *Valtierra*, 402 U.S. 137 (1971)	17
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968)	24
Keith v. *Volpe*, 858 F.2d 467 (9th Cir. 1988)	24
Kirksey v. *City of Jackson, Miss.*, 669 F.2d 316 (5th Cir. 1982)	11, 12
Linmark Assocs. v. *Township of Willingboro*, 431 U.S. 85 (1977)	2, 23
Lorillard v. *Pons*, 434 U.S. 575 (1978)	28
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	20
Macone v. *Town of Wakefield*, 277 F.3d 1 (1st Cir. 2002)	24
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986)	3
Metropolitan Hous. Dev. Corp. v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977)	24
Mountain Side Mobile Estates P'ship v. *Secretary of HUD*, 56 F.3d 1243 (10th Cir. 1995)	29
National Fair Hous. Alliance, Inc. v. *Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46 (D.D.C. 2002)	25
Palmore v. *Sidoti*, 466 U.S. 429 (1984)	12, 13
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989)	18
Resident Advisory Bd. v. *Rizzo*, 564 F.2d 126 (3d Cir. 1977)	24
Smith v. *Town of Clarkton, N.C.*, 682 F.2d 1055 (4th Cir. 1982)	12

TABLE OF AUTHORITIES – continued

	Page
Texas Dep't of Cmty. Affairs v. *Burdine*, 450 U.S. 248 (1981)	16
Town of Huntington v. *Huntington Branch, NAACP*, 488 U.S. 15 (1988)	22
Trafficante v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)	19, 24
United States v. *City of Black Jack, Mo.*, 508 F.2d 1179 (8th Cir. 1974)	24, 30
United States v. *City of Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981)	24, 30
United States v. *Mead Corp.*, 533 U.S. 218 (2001)	29, 30
United States v. *Mitchell*, 580 F.2d 789 (5th Cir. 1978)	30
United States v. *Yonkers Bd. of Educ.*, 837 F.2d 1181 (2nd Cir. 1987)	12, 30
Village of Arlington Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977)	*passim*
Washington v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)	17
Watson v. *Forth Worth Bank & Trust*, 487 U.S. 977 (1988)	4, 21, 25
Wisconsin v. *Mitchell*, 508 U.S. 476 (1993)	3, 18

STATUTES AND REGULATION

42 U.S.C. § 2000e-2(a)-(d)	23
42 U.S.C. § 3601	23
42 U.S.C. § 3604(a)	23
42 U.S.C. § 3608(a)	29
42 U.S.C. § 3610(g)(2)(C)	30
42 U.S.C. § 3614	30
Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266 (Apr. 15, 1994)	30

TABLE OF AUTHORITIES – continued

ADMINISTRATIVE DECISION — Page

HUD v. *Mountain Side Mobile Estates*, 2 Fair Hous.-Fair Lend. Rptr. (P-H) ¶ 25,053 (HUD Sec'y), *on remand*, 2 Fair Hous.-Fair Lend. Rptr. (P-H) ¶ 25,057 (HUD Sec'y 1993) 29

LEGISLATIVE HISTORY

Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary, 100 Cong. (1987) 27
Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing, and Urban Affairs, 103 Cong. (1994) 29
H.R. Rep. No. 100-711 (1988) 28
114 Cong. Rec. 2277 (1968) 26
2526 (1968) 26
2699 (1968) 26
5214 (1968) 26
5216 (1968) 27
5218 (1968) 27
5220 (1968) 26
5220-21 (1968) 27
5221-22 (1968) 27
134 Cong. Rec. 23711-12 (1988) 28

SCHOLARLY AUTHORITIES

Robert G. Schwemm, *Housing Discrimination: Law and Litigation* (2001) 2, 21
David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (1999) 7

TABLE OF AUTHORITIES – continued

OTHER AUTHORITIES — Page

Report of the National Advisory Commission on Civil Disorders (1968) 25
HUD, No. 8024.01, *Title VIII Complaint Intake, Investigation, and Conciliation Handbook* (1995) 29

INTEREST OF *AMICI*

The National Fair Housing Alliance ("NFHA") is a non-profit corporation that represents approximately eighty-five private, non-profit fair housing organizations. NFHA was founded in 1988 to battle housing discrimination and to seek to ensure equal housing opportunity for all people. NFHA promotes equal housing, lending, and insurance opportunities through education, outreach, policy initiatives, advocacy and enforcement. Relying on the Fair Housing Act of 1968 ("FHA" or "Act"), NFHA and its members have undertaken important enforcement initiatives to eliminate discriminatory housing practices in cities and States across the nation.

AARP is the nation's leading organization for people age 50 years and older, with 35 million members. At the national and state level, AARP is actively involved in eliminating barriers to homeownership through research, advocacy, education and litigation. The FHA has been an important tool in AARP's pursuit of this goal and in its advocacy efforts to eliminate predatory lending practices.

The Catholic Commission of Summit County, Ohio is the social action arm of the diocese of Cleveland for Summit County. The Commission engages in public policy advocacy, community development, and educational efforts. Over the past 20 years, the Commission has formed seven affordable housing-related organizations, one of which provided a grant to help fund the housing development at issue in this case.

The Northeast Ohio American Friends Service Committee ("AFSC") is a Quaker-related social action organization committed to the principles of nonviolence and justice. AFSC opposes social, economic and political inequality, and

discrimination. AFSC seeks to change such conditions at the local level.[1]

The FHA reflects "a strong national commitment to promot[ing] integrated housing." *Linmark Assocs* v. *Township of Willingboro*, 431 U.S. 85, 95 (1977). Among the causes of residential segregation that Congress sought to eliminate was the refusal by predominantly white suburbs to accept low-income housing. This case illustrates the persistence of such refusals, and demonstrates why, some 34 years after the FHA was passed, "[h]ousing in the United States continues to be characterized by extremely high levels of racial segregation and unlawful discrimination." Robert G. Schwemm, *Housing Discrimination: Law and Litigation* § 2.1, at 2-1 (2001).

The evidence in this case reveals that city officials engaged in a concerted and discriminatory campaign to block construction of a low-income housing development, a campaign that included, but was by no means limited to, an eleventh-hour referendum petition. Invoking the First Amendment, petitioners ask this Court to immunize this illegal campaign from judicial scrutiny because it relied, in part, on use of the referendum process. If the Court accepts this invitation, it will offer a blue-print that other cities can use to evade the FHA and to frustrate its fundamental goals. Because *amici* are committed to ensuring the realization of those goals, they file this brief in support of respondents and urge affirmance, in part, of the judgment below.

SUMMARY OF ARGUMENT

1. Respondents do not, as petitioners claim, seek to hold city officials liable simply because they withheld building

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

permits after receiving a properly filed citizen petition. To the contrary, respondents offered evidence of a very different FHA violation below, and the lower court's judgment is that this evidence could sustain a finding of intentional discrimination. Viewing that evidence "'in the light most favorable'" to respondents, *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), a jury could find that city officials were not simply passive recipients of a citizen petition. Instead, the evidence reveals that city officials engaged in a concerted and discriminatory campaign to block respondents' housing development by, among other things, prompting an unprecedented (and invalid) petition drive, then aiding and abetting that drive through a series of discretionary acts to ensure that their "approval" of the development would never take effect. Based on this evidence, a jury could properly conclude that the decision to withhold the permits was simply the intended outcome of a broader and illegal campaign.

Evidence concerning citizen opposition to the development is plainly relevant to determining whether city officials undertook this campaign in order to appease the disciminatory animus of their constituents, as this Court has made clear in numerous decisions, including *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Use of such evidence is also fully consistent with the First Amendment. Petitioners' arguments concerning the chilling effect of any inquiry into citizen motivation ignore the city's opportunity to show that it acted for proper reasons. This Court, moreover, has never suggested that the First Amendment bars inquiries into whether legislators acted to appease discriminatory sentiment, and has recognized that protected speech can provide evidence of intent. *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993).

The sweeping prohibition on evidence of discriminatory intent that petitioners advocate would render the promises of the Equal Protection Clause and the FHA illusory.

Expressions of racial and other forms of discrimination are not entitled to preferential "breathing space," and city officials cannot escape liability for giving effect to such animus simply because they did so by relying, in part, on a petition drive. If petitioners have legitimate reasons for their conduct, they should explain them to a jury. They should not be allowed to invoke the First Amendment to immunize their official conduct from all judicial scrutiny.

2. This case provides no occasion for this Court to decide whether the FHA permits a finding of liability based on disparate impact analysis. Respondents did not pursue a true disparate impact claim below, and have now formally abandoned this theory. This Court should not decide the question in the absence of an adversarial presentation of the issues.

Further, the facts of this case do not state a disparate impact claim. The only facially neutral rule respondents challenged was the local law that stayed approval of respondents' site plan once the referendum petition was filed. This was the first and only time the provision has ever blocked approval of a site plan. A single application of the "automatic stay" provision does not afford a sufficient evidentiary basis for finding that this law has an unjustified disparate impact on protected persons. *Watson* v. *Forth Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

3. If the Court nevertheless chooses to address the issue, it should rule that disparate impact analysis is a valid basis for imposing liability under the FHA. The FHA uses the same operative language as Title VII, which this Court long ago held permits a finding of liability based on disparate impact. Linguistic consistency, as well as the shared remedial purposes of the two laws, compels the conclusion that the FHA also includes a disparate impact cause of action. Indeed, the circuit courts have unanimously so held.

This construction of the Act is confirmed by its legislative history. In seeking to promote integrated residential housing, proponents of the FHA recognized that segregation stemmed in part from ostensibly neutral laws and governmental practices, and they sought to undo the effects of those laws and practices. In addition, they recognized that proving intentional discrimination would often be extremely difficult. Recognition of a disparate impact cause of action is thus essential to achieving the goals of the FHA. Indeed, when it amended the Act in 1988, Congress knew that courts had uniformly recognized such a cause of action, and it necessarily ratified that construction by preserving the Act's operative language.

Finally, even if the language, purpose and history of the Act did not compel recognition of a disparate impact cause of action, this Court should defer to the views of the agencies charged with administering and implementing the law, all of which have found that the FHA permits a finding of liability based on disparate impact.

I. THE LOWER COURT PROPERLY REVERSED THE GRANT OF SUMMARY JUDGMENT TO PETITIONERS.

Viewed in the light most favorable to respondents, the evidence shows that petitioners were not passive observers of citizen democracy in action, but instead prompted and facilitated a petition drive as part of a discriminatory campaign to block respondents' housing development. This evidence is sufficient to sustain a finding of intentional discrimination. Permitting a city to be held liable for such conduct is wholly consistent with this Court's precedents and poses no threat to any First Amendment rights.

A. The Evidence, Viewed Most Favorably To Respondents, Would Support A Finding Of Intentional Discrimination By City Officials.

To establish a prima facie case of intentional discrimination under the Equal Protection Clause and the FHA, a plaintiff need only show that "a discriminatory purpose has been a motivating factor" in the challenged action *Arlington Heights*, 429 U.S. at 265-66. In reviewing the evidence bearing on this central issue, the lower court was not restricted to considering only the motivation of the city engineer who declined to issue the building permit, as petitioners contend, Pet. Br. at 12. Rather, the court was obligated to undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Here, a wealth of direct and circumstantial evidence would allow a reasonable juror to conclude that the city engineer's refusal to issue the building permits was the intended result of a concerted campaign by city officials to give effect to their own discriminatory animus and that of their constituents. The lower court's judgment that respondents' evidence is sufficient to state a prima facie case of intentional discrimination was plainly correct, and should be affirmed. See *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 625 n.11 (1986) (this Court "reviews judgments, not opinions") (internal quotation marks omitted).

From the outset, respondents encountered a remarkable level of opposition to their development. Before even voting on the development, city planners requested unprecedented accommodations from respondents, including the construction of an eleven-foot earth and brick barrier to shield adjacent property.[2] Tr. Prelim. Inj. Hr'g ("Tr.") 47; Sixth Circuit J.A. ("App.") 152-54, 966-67. And while approval of a site plan is

[2] One council member testified that she could not recall any other instance where a developer was asked to build such a barrier. *See* J.A. 49.

ordinarily a routine matter, respondents' site plan was the subject of three separate, and quite heated, public meetings. Prior to several of these meetings, moreover, city officials urged residents to attend to express their strong opposition to the development. Tr. 135-37, 271-74; App. 488-84.

As a result, many citizens spoke out vehemently against the development in language that a reasonable fact-finder could interpret as veiled racism. One resident objected that "[w]e have got our ghetto[]" already, while another, who later helped lead the referendum drive, warned of the "kind of element [that] is going to be moving in there, just like you have on Prange Drive," a reference to the only development in Cuyahoga Falls with a significant African American population. J.A. 40, 139; Tr. 270, 182-85, 316. Other residents expressed concerns that "there will be a different class of people living there," that Cuyahoga Falls would be "downgrading itself," and that the development would attract crime and "boom boxes," J.A. 40, 44, 144, 162, comments typical of racial stereotyping. See David Cole, *No Equal Justice: Race And Class in the American Criminal Justice System* 34, 42 (1999).[3]

Echoing what he perceived to be "the mood of the community," Mayor Robart also expressed opposition in terms indicative of discriminatory animus. He argued that the development represented the same type of "social engineering that brought us busing," and referred to a newspaper article entitled "Stuck in the Ghetto," which discussed problems with Section 8 housing. J.A. 189. Mayor Robart also agreed with the comments of a state representative who attended a city council meeting and argued that "condensing *these*

[3] Racial animus could also be fairly inferred from the threatening behavior of some opponents of the development. One threatened to throw respondent Steven Boone out a window, while several others followed him to his car after a public meeting Tr. 37 – menacing conduct not typically prompted by concerns over a development's impact on sewer or storm water drainage systems. Pet. Br. at 16.

individuals in one place . . . just breeds problems." App. 917-20 (emphasis added).

In addition, there is evidence that opponents of the development were motivated by unlawful discrimination against families. At a meeting of the planning commission, Council Member George Potts explained that residents were concerned that the development would "potentially have a lot of children" and that its lifestyle would therefore differ from that of a nearby retirement community. App. 479; J.A. 37. The city's planning director explained that the commission requested the unprecedented barrier surrounding the development because "this project would be a larger family type project." J.A. 98. Residents repeatedly expressed concerns about the number of children that would live in Pleasant Meadows. *Id.* at 140, 163-64. One asked respondents, "Are your little kids going to shut up right at sunset?" *Id.* at 44. And at the meeting to organize the referendum petition, residents expressed concern about the children that would move in to the development. Tr. 295.

City officials responded to these sentiments by providing assurances that they were doing everything in their power to block the development. Council Member Sandy Rubino told residents that he had "looked under every rock" for a legitimate reason to vote against the development. J.A. 144. Council President Barbara White said she and other city officials had looked for "any legal shred that we could hang onto so that we could reject this project." *Id.* at 150.

As part of these efforts, city officials first conceived the idea of a "citizen-led" referendum, then went to extraordinary lengths to ensure that it prevented the site plan from taking effect. It was the city's law director, not citizens, who first raised the possibility of a referendum to block the development at a council meeting on March 4, 1996. J.A. 174. At this same meeting, Mayor Robart urged the council to delay its vote on whether to approve the site plan "two weeks, a month" or longer in order to "buy time." App. 967.

After the meeting, the mayor met with the citizens who ultimately conducted the petition drive, and consulted with them about the name of the group. *Id.* at 1174.

At a March 18, 1996 meeting, Mayor Robart again urged vigorous opposition to the development, J.A. 155, and suggested the city engage in a legal war of attrition with respondents that would delay approval until the development became financially untenable.[4] At the conclusion of that meeting, the council again declined to approve the site plan, despite its recognition that there was no valid legal ground for rejecting it. *Id.* at 145-46, 148-49. Instead, it tabled a vote to give the legal department another chance to see "if there was any possible reason . . . that [the City] could turn [the project] down legally." App. 1265. Council President Barbara White wrote to the city's law department, asking whether the council could reject the site plan without incurring liability and whether a referendum could block the development. *Id.* at 974-75.

After the law department confirmed that there was no legitimate ground for rejecting the site plan, the council approved it by a slim majority on April 1, 1996. Tr. 43. Shortly thereafter, the referendum leaders held their first public meeting, which three council members and Mayor Robart attended. *Id.* at 292. Although the council members were asked to leave, the mayor remained and expressed support for the petition drive. Docket Entry R. ("R.") Exh. D, at 84-88; App. 903, 1174. The day after the meeting, the mayor wrote the city's law department to ask how many signatures were needed. App. 979. Although the law department provides legal advice to the council, not those seeking to block council actions, *id.* at 816-17, it provided the requested information.

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[4] The Mayor explained that the city's law department is paid no matter what it is doing, whereas respondents would have to hire lawyers and decide how long they "want to pursue this thing, given the fact that we all know that somewhere along the line there is a deadline." App. 945.

Before the site plan ordinance took effect, the mayor directed the city's service director to issue a memorandum requesting that no building permits be issued until further notice. R. 34, Exh. A. The service director issued the memorandum to the city engineer, who had never seen such a directive for any other development. Tr. 193-94. Following receipt of the referendum petition, the law department advised that any building permits should be held in abeyance. R. 34, Exh. A.

Despite the "automatic stay" effected by the filing of the petition, the council still could have authorized issuance of the permits by passing an emergency ordinance with the support of eight of eleven council members. The council failed to do so, however, when, on May 28th, three council members again voted against the ordinance, and another two members abstained. Tr. 196. As a result, the city engineer declined to issue the permits.

Viewing these facts and all reasonable inferences to be drawn from them in the light most favorable to respondents, a reasonable juror could find that city officials, motivated either by their own discriminatory animus or a desire to appease that of their constituents, mounted a concerted campaign to block respondents' development. As part of that campaign, they repeatedly departed from the normal procedural and substantive standards for site plan approval by delaying votes in order to search for non-zoning bases for rejecting the development. See *Arlington Heights*, 429 U.S. at 267 & n.17 ("[d]epartures from the normal procedural sequence" and failure to rely on factors "usually considered important by the decisionmaker" are strong indications "that improper purposes are playing a role"). Unable to find such grounds, they prompted and then abetted a petition drive cynically designed to provide a "nondiscretionary" basis for discriminating against African Americans and families with children. This view of the city's conduct is buttressed by the facts that (1) no other site plan had ever been the subject of a

referendum petition, let alone a petition proposed and openly encouraged by city officials after consultations with city lawyers, (2) the council had approved an even larger development (that did not involve subsidized housing) for the exact same site three years earlier, J.A. 43, 137, App. 148, and (3) denial of respondents' smaller development had a disproportionate impact on protected groups. See *Arlington Heights*, 429 U.S. at 266 (fact that official action bears more heavily on protected groups may serve as circumstantial evidence of discriminatory intent).[5]

Contrary to the claims of petitioners and the United States, a jury reviewing this evidence would not be required to consider only those actions city officials took after the petition was filed. See Pet. Br. at 11-15; Brief of the United States as *Amicus Curiae* Supporting Petitioners ("U.S. Br.") at 27-32. Even if city officials lacked discretion to issue building permits after the petition was filed, a jury could reasonably find that respondents' injury resulted from a coordinated campaign of discretionary (and impermissibly motivated) actions through which city officials ensured that a petition drive they had prompted and abetted would preclude their site plan approval from ever taking effect. Cf. *Kirksey* v. *City of Jackson, Miss.*, 669 F.2d 316, 317 (5th Cir. 1982) (per curiam) ("[t]he referendum process may not be used to legitimate an unconstitutional act"). In short, city officials cannot escape liability for blocking respondent's development by claiming that their "hands were tied," when the evidence shows that they told citizens to buy the rope, explained how to tie it, and stalled long enough to make sure the knot was firmly in place in time.

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[5] The fact that the mayor himself did not "organize[] the petition drive" or "secure[] meeting places" for it, Pet. App. 128a-129a, does not preclude a finding that city officials collectively prompted and abetted the drive in order to give effect to the discriminatory animus of vocal citizens.

B. The Discriminatory Motives Of Citizens Are Relevant To Determining Whether Officials Sought To Give Effect To Those Motives.

Tacitly recognizing the sufficiency of respondents' showing, petitioners try to foreclose consideration of key pieces of the evidence against them. Thus, they argue that courts may consider only the discriminatory motives of the officials themselves, not the animus of the citizens those officials represent. Contrary to petitioners' claims, however, numerous decisions of this Court, including *Arlington Heights*, confirm the relevance of evidence of citizen animus.

This Court has long held that government officials engage in intentional discrimination by giving effect to the discriminatory motives of the electorate. See *City of Cleburne, Tex.* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (city officials violated Equal Protection Clause by blocking construction of home for the mentally retarded in response to community prejudice); *Palmore* v. *Sidoti*, 466 U.S. 429 (1984) (state court violated 14th amendment by taking into account societal prejudice when it declined custody of child to white mother who had married African American man); *Buchanan* v. *Warley*, 245 U.S. 60 (1917) (city officials violated equal protection when they banned African Americans from buying property in majority-white neighborhoods to prevent racial conflicts).[6] Some "[p]rivate biases may be outside the reach of the law, but the law

[6] *See also United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1226 (2d Cir. 1987) (city officials can be liable under the 14th Amendment if "racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker is knowingly responsive"); *Smith* v. *Town of Clarkton, N.C.*, 682 F.2d 1055, 1063 (4th Cir. 1982) (city officials violated Equal Protection Clause and FHA by blocking low-income housing development in response to citizen opposition "motivated in significant part by racial considerations"); *Kirksey*, 669 F.2d at 316-17 (motivation of the electorate may be considered in a proper case).

cannot, directly or indirectly, give them effect." *Palmore*, 466 U.S. at 433.

Nothing in *Arlington Heights* precludes courts from considering evidence that city officials sought to appease the discriminatory animus of citizens. Indeed, in *Arlington Heights* itself, this Court *approved* the lower courts' inquiry into whether city officials had refused to rezone based on the racially motivated comments of some opponents of the housing project. 429 U.S. at 268-69. By recounting the lower courts' conclusion that the evidence in that case did not warrant a finding that the officials had been so motivated, the Court confirmed the relevance of the inquiry; nowhere did it fault the lower courts for considering such evidence.[7]

The evidence in this case, of course, is starkly different from that in *Arlington Heights*. There, city officials handled the rezoning request "according to the usual procedures" and "focused almost exclusively on the zoning aspects of the [rezoning] petition." *Id.* at 269-70. Here, city officials repeatedly departed from their usual procedures – imposing unprecedented conditions, tabling routine votes, issuing unprecedented directives, and proposing and abetting an unprecedented referendum – and openly searched for non-zoning grounds in order to reject the development.

Nor are the comments of opponents of the development rendered legally irrelevant because city officials "approved" the site plan. Pet. Br. at 13-14. This Court has explained that "the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal

[7] *Arlington Heights* also forecloses petitioners' claim that citizen comments are relevant only where city officials act "'for the *sole purpose* of appeasing racially motivated opponents.'" Pet. Br. at 14 (emphasis added) (quoting *United States* v. *Birmingham*, 538 F. Supp. 819, 827 (E.D. Mich. 1982)). Because government officials rarely take any action "motivated solely by a single concern," a plaintiff need only show that "a discriminatory purpose has been a motivating factor" in the challenged action. *Arlington Heights*, 429 U.S. at 265-66.

Protection Clause . . . and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne*, 473 U.S. at 448. It is equally plain that the city cannot avoid these twin strictures through a discriminatory campaign that *combines* aspects of both types of proscribed conduct. Viewed in the light most favorable to respondents, the evidence shows that city officials "defer[red] to the [discriminatory] wishes or objections of the body politic" by repeatedly delaying a vote on the site plan in order to abet a petition drive that would "order" the very action that city officials themselves could not take. To bar consideration of citizen comments because city officials nominally approved an ordinance only after devising a scheme to render that approval ineffective would indulge the most artificial of pretexts, and reward the most cynical of subterfuges.

C. Consideration Of Citizen Comments Does Not Threaten Any First Amendment Rights.

Petitioners and their *amici* argue that the use of citizen comments as evidence of intentional discrimination threatens core First Amendment values. They claim that the use of such evidence threatens to saddle a city with liability based on the expressions of a handful of individuals, and will chill core political activity by officials and citizens, who will fear that their valid motives for voting, signing petitions or speaking against measures will be tainted by association with those who vote, sign or speak for illegal reasons. See Pet. Br. at 16-19; U.S. Br. at 17. These claims are groundless.

1. The Governing Evidentiary Framework Protects The City From Improper Imputation Of Discriminatory Animus.

In arguing that judicial scrutiny of citizen comments will result in cities being held liable for the views of a few citizens, petitioners ignore the evidentiary framework that governs intentional discrimination claims. Under *Arlington Heights*, courts must conduct a "sensitive inquiry" into many factors, including the impact of the challenged action, its historical background, and the sequence of events leading up to the action. See 429 U.S. at 266-68. Statements by citizens and officials are only part of the broad picture that the factfinder must consider. Indeed, in concluding that the evidence "at least, raise[s] a genuine issue of material fact as to whether the City . . . gave effect to the racial bias of its citizens," the Sixth Circuit made clear that it considered all "the circumstances surrounding the opposition to the project," not just the comments of a few citizens. See *Buckeye Comty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 637 (6th Cir. 2001).

Petitioners also ignore the opportunity they will have to rebut respondents' view of the evidence and to come forward with evidence to show that the actions described above were not taken for improper reasons. Thus, petitioners could offer arguments or evidence to show that they delayed votes, imposed unprecedented conditions and prompted an unprecedented petition drive not because they sought to give effect to discriminatory animus, but because they concluded that current zoning laws fail to accommodate legitimate concerns over density, noise, pollution and traffic. Cf. *Arlington Heights*, 429 U.S. at 270 (evidence showed that officials focused on appropriate zoning factors and neighbors' reliance on zoning policies). If, after a full and fair trial, the fact-finder nevertheless imposes liability, it will not be because a mere "one ten-thousandth of the City's population" was motivated by racial or other improper animus. Pet. Br. at 16. Instead, liability will rest on a successful showing that city officials gave effect to impermissible discrimination, and that their explanations for their actions are mere pretexts.[8] Cf.

[8] Respondents might succeed in proving pretext, for example, by showing that the larger complex the city approved would have entailed the same or greater impacts on sewers, school systems, traffic and pollution,

Texas Dep't of Cmty. Affairs v. *Burdine*, 450 U.S. 248, 253, 255 n.10 (1981) (Title VII plaintiff pursuing an intentional discrimination claim must prove that "legitimate reasons offered by the defendant were . . . a pretext for discrimination").

In short, the city was not precluded from rejecting the development once one citizen expressed racial opposition. Pet. Br. at 19-20. Petitioners will have a full opportunity to show that they acted for legitimate reasons. They cannot escape their burden of making that showing, however, by barring consideration of evidence demonstrating that they in fact sought to appease the discriminatory animus of citizens.

2. Considered Within The Governing Framework, Protected Speech May Be Used As Evidence Of Discriminatory Intent.

Because petitioners have a chance to prove the propriety of their actions, arguments concerning "the potential for chilling First Amendment rights," U.S. Br. at 17, amount, in reality, to an extraordinary plea for protection against the mere chance of an erroneous finding of intentional discrimination, reached after a full and fair trial. But the "breathing space" petitioners and their *amici* seek for expressions of discriminatory animus, *id.* at 19, is not justified by the First Amendment, and is wholly inconsistent with this Court's decisions. To protect the "critically important rights" that both the "Fair Housing Act and, *a fortiori*, the Fourteenth Amendment safeguard," *id.* at 20, this Court has long permitted judicial inquiries into the intent of legislators and the electorate alike. It has likewise recognized that protected speech can provide direct evidence of discriminatory animus, and that evidentiary use of such speech to prove intent is constitutionally permissible. To hold otherwise would eviscerate the promise of the Equal Protection Clause and the FHA.

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and by pointing to the statements of Mayor Robart, who emphasized that the issue was *not* density. J.A. 154.

This Court has frequently endorsed inquiries into the motives of legislators and voters to determine whether legislation was enacted for an unlawful purpose. Indeed, as noted above, in *Arlington Heights*, the Court approved judicial examination of the motives of city officials whose zoning decision had a disproportionate adverse impact on minorities. 429 U.S. at 268-69. Similarly, the Court has held that when a facially neutral referendum is challenged under the Equal Protection Clause, "an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations." *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484-85 (1982). Even when rejecting such challenges, the Court has made clear that "a law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose." *Crawford* v. *Board of Educ.*, 458 U.S. 527, 544 (1982); see also *id.* at 545 (applying *Arlington Heights* factors to facially neutral referendum and finding "no reason to challenge the Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose"); *James* v. *Valtierra*, 402 U.S. 137, 141 (1971) (the "record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority.").

In none of these cases did the Court suggest that the First Amendment posed any barrier to the required judicial inquiry into intent. To the contrary, in *Arlington Heights*, the Court mandated a "sensitive inquiry into such circumstantial *and direct* evidence of intent as may be available." 429 U.S. at 266 (emphasis added). Statements by legislators and voters espousing discriminatory views or a desire to appease such views is the most "direct evidence" of discriminatory intent available. Indeed, the Court noted that, in some cases, the members of an administrative or legislative body "might be called to the stand at trial to testify concerning the purpose of the official action." *Id.* at 268. The Court recognized that

"inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government," *id.* at 268 n.18, and that some testimony might be barred by privilege, *id.* at 268 (citing *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (Speech or Debate Clause) and *United States* v. *Nixon*, 418 U.S. 683 (1974) (executive privilege)). Notably, however, the Court did *not* include the First Amendment among its list of possible impediments to inquiries into legislative intent – despite its recognition, just two paragraphs later, that such inquiries may include an examination of whether officials were motivated by the discriminatory views of citizens, *id.* at 268-69.

In fact, in other contexts, the Court has made clear that the First Amendment does not prohibit use of speech – even core political speech – as evidence of motive or intent. In *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993), a criminal defendant argued that his sentence was enhanced in violation of the First Amendment because prosecutors used statements he had made to prove that his crime was motivated by racial bias. In rejecting this argument, the Court explained that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like." *Id.* at 489. To support its holding, the Court cited *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), a civil case in which statements made by the defendant employer were admissible to prove discrimination. See *Mitchell*, 508 U.S. at 490. The Court also cited *Haupt* v. *United States*, 330 U.S. 631 (1947), a case in which political statements made by the defendant were admissible as evidence of intent in his trial for treason. See *Mitchell*, 508 U.S. at 489.

In short, the First Amendment does not preclude use of discriminatory statements by citizens as evidence that city officials sought to give effect to the discriminatory animus of

their constituents. Certainly, such statements do not deserve more "breathing space" than other core political speech that the Court has held admissible to prove intent. Indeed, neither petitioners nor their *amici* explain why expressions of racial and other forms of illegal discriminatory animus should be accorded special evidentiary status, when such animus cannot provide a valid basis for legislative action. See *Arlington Heights*, 429 U.S. at 266; *City of Cleburne*, 473 U.S. at 448.

To hold otherwise, moreover, would severely undermine the protections of the Equal Protection Clause and the FHA. City officials will rarely, if ever, openly acknowledge that they are acting to give effect to the illegal animus of citizens. To foreclose use of citizen expressions of such animus as evidence that officials were so motivated, therefore, would essentially immunize conduct that violates both the Constitution and a federal statute designed to vindicate "'a policy that Congress considered to be of the highest importance.'" *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

Indeed, this case provides a virtual blueprint for how cities can evade the FHA. On respondents' view of the facts, which must be accepted for present purposes, city officials prompted and then abetted a petition drive that simultaneously effectuated the city's discriminatory goal while ostensibly purging it of any impermissible taint. Petitioners and their *amici* now ask this Court to bless this plan of evasion, arguing that the petition drive precludes all liability for the "nondiscretionary" withholding of building permits, that it precludes any inquiry into the motivations of citizens who led the drive, or that, at a minimum, it permits a finding of liability only if the petition itself is a "sham."[9] This Court

[9] Respondents' evidence would permit a finding that the petition *was* a "sham," in that it was part of a concerted campaign to discriminate. But the test the United States proposes would ignore the role of officials in that campaign, and would focus instead solely on whether the referendum was "'objectively baseless.'" U.S. Br. at 18. Because "hypothetical" or

should reject this invitation. If petitioners have legitimate reasons for their conduct, they should explain those reasons to a jury. They should not be allowed to use a petition drive as part of a concerted campaign of discrimination, and then to invoke the First Amendment to immunize that campaign from judicial scrutiny and liability.

II. THIS CASE DOES NOT PRESENT THE QUESTION WHETHER LIABILITY UNDER THE FHA MAY BE BASED ON DISPARATE IMPACT.

This case presents no occasion for the Court to decide whether the FHA includes a disparate impact cause of action. Respondents have disavowed such a claim in this Court, and the United States has declined to address the issue. In all events, the facts of this case do not give rise to a disparate impact claim. Accordingly, this Court should vacate the lower court's holding that respondents were entitled to pursue a disparate impact claim under the FHA.

Although respondents made a "disparate impact" argument below, they did not identify a facially neutral *practice or policy*, adopted without discriminatory intent, that had a disproportionate effect on protected groups. To the contrary, even as part of their "disparate impact" analysis, respondents claimed that city officials blocked the development through a series of ad hoc actions designed to "comply[] with the discriminatory wishes of" citizens. Appellants' Br. at 25. Respondents have now confirmed that they are not pursuing a disparate impact claim.

As a result, this Court lacks the benefit of an adversarial presentation by parties with "an actual, as opposed to a professed, stake" in the question presented. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring). Indeed, the United States, which administers

"possible" nondiscriminatory grounds for opposing a housing development can always be postulated, no discriminatory scheme that made use of a facially neutral referendum would ever be illegal under this test.

and enforces various aspects of the FHA, see *infra* at 28-29, has declined to address whether the FHA includes a disparate impact cause of action. U.S. Br. at 12 n.1. For prudential reasons alone, therefore, this Court should decline to address the issue at this time.

In any event, the facts of this case do not give rise to such a claim. "[T]he necessary premise of the disparate impact approach is that some . . . *practice[]*, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson*, 487 U.S. at 987 (emphasis added); see also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31 (1971). The discriminatory impact of a facially neutral practice or policy is established by examining its "operation" over a range of applications.[10]

The predicates for disparate impact analysis are absent here. The only neutral rule that contributed to respondents' FHA injury was the provision of the city charter that stayed approval of respondents' site plan when the referendum petition was filed. Because the referendum provision had never before been invoked to block approval of a site plan, respondents could show only that a *single application* of a facially neutral law bore more heavily on protected groups. A single application of the city's "automatic stay" provision simply does not afford a sufficient evidentiary basis for determining whether this facially neutral rule operates as the functional equivalent of intentional discrimination. See Schwemm, *supra*, § 10:6, at 10-43 (disparate impact "is not

[10] *See, e.g.*, *Griggs*, 401 U.S. at 429 (aptitude test and high school diploma requirement rendered "a markedly disproportionate number of Negroes" ineligible for job); *Dothard* v. *Rawlinson*, 433 U.S. 321, 329-30 (1977) (height requirement excluded one-third of all women, but less than 2% of all men); *Connecticut* v. *Teal*, 457 U.S. 440, 443-44 (1982) (hundreds of test results showing disproportionate pass rates of blacks and whites established disparate impact of written examination for promotions).

appropriate for claims that are based on a single act or decision").[11]

In short, because there is no evidence that current housing segregation is attributable to the city's facially neutral "automatic stay" provision, the fact that members of a protected class are adversely affected by the first and only application of that law does not provide a sufficient evidentiary basis for application of disparate impact analysis.

III. DISPARATE IMPACT IS A VALID BASIS FOR IMPOSING LIABILITY UNDER THE FHA.

If this Court reaches the issue, it should hold that the FHA authorizes a disparate impact cause of action. The FHA employs precisely the same operative language as Title VII of the Civil Rights Act of 1964, and this Court long ago concluded that this language permits a finding of unlawful discrimination based on appropriate evidence of disparate impact. Linguistic consistency, and the related aims of the two laws, compel the same construction of the FHA, as every court of appeals has concluded. The propriety of such a construction is confirmed by the Act's legislative history, by Congress's tacit ratification, in 1988, of judicial adoption of disparate impact analysis under the FHA, and by agency implementation of the Act.

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[11] In some cases, courts have entertained disparate impact challenges to a "single decision" that simply affirmed a policy that had long exerted a segregative effect on the town. *See, e.g., Town of Huntington* v. *Huntington Branch, NAACP*, 488 U.S. 15, 17 (1988) (town's refusal to amend zoning law restricted private construction of multifamily housing to a largely minority area, thereby "significantly perpetuat[ing] segregation in the Town.") (internal quotation marks omitted). Such disparate impact challenges are really leveled at the long-standing policies, not isolated applications of laws that have not contributed to the segregated nature of the town.

A. The Text And Purpose Of The FHA Compel The Conclusion That It Permits A Finding Of Liability Based On Disparate Impact Analysis.

Section 3604(a) of the FHA makes it illegal to "make unavailable or deny[] a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The FHA's operative "because of" language is identical to the operative language of Title VII, which bars discrimination against an employee "because of such individual's race, color, religion, sex, or national origin." 42 § U.S.C. 2000e-2(a)-(d). In *Griggs*, this Court held that Title VII prohibits not only intentional discrimination, but also employment practices that have unjustified discriminatory effects. "Linguistic consistency requires" that the operative language of the FHA be given the same meaning as "the same operative language" in Title VII. *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889, 1893 (2002) (phrase "arising under" in 28 U.S.C. § 1338 must have same meaning that Court gave that phrase in § 1331) (internal quotation marks omitted).

Far more than "linguistic consistency," however, compels such a construction of the FHA. In concluding that Title VII authorizes liability based on unjustified disparate impact, this Court focused on the broad purposes underlying that statute, observing that it was intended "to achieve equality of employment opportunities and remove barriers that have operated in the past" to hurt minority employees. *Griggs*, 401 U.S. at 429-30. The same broad remedial objectives prompted passage of the FHA. The Act declares that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. This Court has frequently recognized "the broad remedial intent of Congress embodied in the Act," *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380 (1982), which reflects "a strong national commitment to promot[ing] integrated housing," *Linmark Associates*, 431

U.S. at 95, and seeks to achieve that goal by outlawing "a broad range of discriminatory practices," *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968).

It is precisely because the FHA and Title VII share the same basic purpose of promoting equal opportunity for members of protected groups that this Court has looked to its interpretation of Title VII to give meaning to provisions of the FHA. For example, in *Trafficante*, 409 U.S. at 208-09, the Court interpreted the phrase "'person aggrieved'" in the FHA by citing a case that construed a similar phrase in Title VII. Cf. *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 389-90 (1982) (14th Amendment's discriminatory purpose standard controls claims under the 1866 Civil Rights Act because the laws are "legislative cousins" and it would be "incongruous to construe" them in a "markedly different" manner).

In light of the identical language and purposes of the two laws, the circuit courts have unanimously concluded that the FHA, like Title VII, includes a disparate impact cause of action.[12] These rulings, moreover, reflect a judicial recognition that the FHA could not achieve its broad aim of ensuring equal housing opportunities if it did not reach many public as well as private rules and practices that, however neutral they may appear, operate in a manner that is "functionally equivalent to intentional discrimination."

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[12] *E.g.*, *Macone* v. *Town of Wakefield*, 277 F.3d 1, 5-7 (1st Cir. 2002); *Bangerter* v. *Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995); *Jackson* v. *Okaloosa County, Fla.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith* v. *Volpe*, 858 F.2d 467, 482-84 (9th Cir. 1988); *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 934-36 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 986-88 (4th Cir. 1984); *United States* v. *City of Parma, Ohio*, 661 F.2d 562, 564-65, 576 (6th Cir. 1981); *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 146-49 (3d Cir. 1977); *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1288-90 (7th Cir. 1977); *United States* v. *City of Black Jack, Mo.*, 508 F.2d 1179, 1184-85 (8th Cir. 1974).

Watson, 487 U.S. at 987. Thus, the lower courts have permitted disparate impact claims against appraisal practices, *Hanson* v. *Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986), insurance redlining practices, *National Fair Housing Alliance, Inc.* v. *Prudential Insurance Co. of America*, 208 F. Supp. 2d 46, 58-61 (D.D.C. 2002), and (before familial status protection was included in the Act), adults-only rental policies, *Betsey* v. *Turtle Creek Associates*, 736 F.2d 983, 986-88 (4th Cir. 1984), that effectively made housing "unavailable" to minorities. Without a disparate impact cause of action, these and many other barriers to fair housing could not be eliminated.

B. The Legislative History Confirms That Congress Intended To Provide A Disparate Impact Claim Under The FHA.

Although the Congress that enacted the 1968 FHA was primarily concerned with eliminating intentional discrimination – as it had been four years earlier when it adopted Title VII – proponents of the Act also wanted to undo the discriminatory effects of municipal laws and practices and to ensure that government could not use such laws to circumvent the Act.

Congress adopted the FHA in the wake of the highly publicized report by the National Advisory Commission on Civil Disorders, which had warned that the "Nation is moving toward two societies, one black, one white – separate and unequal." See *Report of the National Advisory Commission on Civil Disorders* 1, 13 (1968). Proponents of the FHA repeatedly pointed out that the facially neutral practices of suburban governments were a principal cause of residential segregation. Thus, the Act's principal sponsor, Senator Mondale, explained that blacks were unable to move to white suburbs because of the "refusal by suburbs and other communities to accept low-income housing. . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been *the policies and practices* of

agencies of government at all levels." 114 Cong. Rec. 2277 (1968) (emphasis added). Similarly, Senator Brooke noted that blacks could not move to better neighborhoods because they were "surrounded by a pattern of discrimination based on individual prejudice, often institutionalized by business and industry, and Government *practices*." *Id.* at 2526 (emphasis added). Of particular relevance, Senator Mondale noted that, after this Court had prohibited explicitly racial zoning laws in *Buchanan* v. *Warley*, 245 U.S. 60 (1917), "[l]ocal ordinances *with the same effect*, although operating more deviously in an attempt to avoid the Court's prohibition, were still being enacted." 114 Cong. Rec. at 2699 (emphasis added).

Proponents of the FHA plainly intended to eliminate these causes of residential segregation. Senator Mondale stated that it "seems only fair, and is constitutional, that Congress should now pass a fair housing act to undo *the effects* of these past State and Federal unconstitutionally discriminatory actions." *Id.* (emphasis added). Indeed, because Congress had undoubted power to proscribe intentional discrimination by States, Senator Mondale would have had no reason to comment on the constitutionality of a fair housing law aimed at state governments unless that law sought to reach the effects of neutral laws and practices.

The legislative history also demonstrates that Congress was aware of the difficulty of proving discriminatory intent. Senator Baker introduced an amendment that would have exempted from liability any homeowner who engaged a real estate agent "without indicating any preference, limitation or discrimination based on race . . . , or an intention to make any such preference, limitation or discrimination." *Id.* at 5214. A number of the bill's proponents objected that the amendment would make proof of discrimination difficult in all but the most blatant cases. Senator Dominick argued that the amendment would "increase[] the opportunity for discrimination," *id.* at 5220, and Senator Percy stated that the amendment

"would require proof that the single homeowner had specified racial preference. I maintain that proof would be impossible to produce." *Id.* at 5216. See also *id.* at 5218, 5220-21 (remarks of Senators Mondale and Hart regarding the difficulty of proving discriminatory intent). In response to these concerns, the Baker amendment was defeated. *Id.* at 5221-22.

In short, proponents of the FHA clearly recognized that residential segregation stemmed in part from ostensibly neutral laws and governmental practices, and they sought to undo the effects of those laws and practices. These facts, together with the widespread recognition that evidence of overt discrimination would often be difficult to uncover, confirm that Congress intended to provide a disparate impact cause of action under the FHA. Indeed, the contrary conclusion would effectively condemn Congress as having adopted a measure manifestly incapable of achieving its intended aims.

C. The Fair Housing Amendments Act Of 1988 Tacitly Approved Disparate Impact Analysis.

Prior to passage of the 1988 Fair Housing Amendments Act ("FHAA"), all eight of the circuit courts that had addressed the issue had concluded that the FHA included a disparate impact cause of action. See note 12, *supra*. Congress was aware of this judicial consensus, and necessarily endorsed it by amending the law without changing the operative "because of" language.

When Congress amends a statute, it is "presumed to have known of [the] settled judicial treatment" of that law. *Edelman* v. *Lynchburg Coll.*, 122 S. Ct. 1145, 1152 (2002) (Title VII case); see also *Cannon* v. *University of Chi.*, 441 U.S. 677, 696-98 (1979). Here, the legislative history of the FHAA shows that Congress had actual knowledge of the FHA impact decisions, see *Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary*, 100 Cong.

529-57 (1987). Indeed, the House Report expressly cited a number of circuit decisions employing disparate impact analysis. See H.R. Rep. No. 100-711, at 21 & n.52, 90-91 (1988) (citing decisions of Second, Fourth and Ninth Circuits).

Aware that illegal racial discrimination in housing was continuing, Congress strengthened enforcement of the Act, see *id.* at 16-18, 33-40, and made no change to the Act's operative "because of" language. In fact, the House rejected an attempt to eliminate disparate impact challenges to local zoning decisions, see *id.* at 89 (describing failed attempt to require showing of "intent to discriminate" in such challenges),[13] and the FHAA's principal sponsor in the Senate explained that "Congress accepted th[e] consistent judicial interpretation" endorsing a disparate impact analysis and "contemplated no such intent requirement." 134 Cong. Rec. 23711-12 (1988) (remarks of Senator Kennedy). In light of this history, the FHAA must be seen as "tacit congressional approval" of the prior judicial decisions endorsing the impact standard. See *Edelman*, 122 S. Ct. at 1151-52; see also *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (Congress is presumed "to adopt [prior judicial] interpretation when it re-enacts a statute without change").

D. Administrative Implementation Of The FHA Supports A Disparate Impact Standard.

Finally, the various agencies charged with implementing and administering the FHA have embraced use of disparate

[13] The House Report also expressly endorsed a disparate impact analysis in cases involving the newly protected class of familial status. It explained that reasonable limitations on the number of occupants per unit would be allowed to continue "as long as they . . . *did not operate to discriminate* on the basis of race, color, religion, sex, national origin, handicap or familial status." H.R. Rep. No. 100-711, at 31 (emphasis supplied); *see also id.* at 21 & n.52 (noting that familial status discrimination "often has a racially discriminatory effect" on minorities and approving cases upholding FHA disparate impact challenges to "adults-only" housing requirements).

impact analysis. Most significantly, the Secretary of Housing and Urban Development ("HUD"), who has "[t]he authority and responsibility for administering th[e] Act," 42 U.S.C. § 3608(a), has endorsed disparate impact. See *HUD* v. *Mountain Side Mobile Estates*, 2 Fair Hous.-Fair Lend. Rptr. (P-H) ¶ 25,053, at 25,492-93 (HUD Sec'y), *on remand*, *id.* ¶ 25,057 (HUD Sec'y 1993). Thus, even if the statute itself did not resolve the issue whether disparate impact is a valid basis of liability – and, as *amici* have just explained, it plainly does – an administrative construction adopted through adjudication is entitled to the highest degree of deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 230-31 & n.12 (2001).[14]

In addition, the Assistant Secretary for Fair Housing and Equal Opportunity has told Congress that "[t]he standards to determine discrimination [in home insurance under the FHA] – as in all other covered areas – will be based on the principles of overt discrimination, disparate treatment, and disparate impact." See *Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103 Cong. 52 (1994). Similarly, HUD's handbook for its FHA enforcement staff endorses impact theory.[15] Thus, even if *Chevron* deference did not apply to the Secretary's interpretation, the view of FHA law

[14] This conclusion is not altered by the fact that the Tenth Circuit reversed this decision on other grounds. *Mountain Side Mobile Estates P'ship* v. *Secretary of HUD*, 56 F.3d 1243 (10th Cir. 1995). In fact, the Tenth Circuit expressly endorsed the Secretary's view that the FHA includes a disparate impact cause of action. *Id.* at 1250-51.

[15] *See* HUD, No. 8024.01, *Title VIII Complaint Intake, Investigation, and Conciliation Handbook*, 3-25 (1995) (housing policy violates the FHA if it has a discriminatory motive or "a disproportionately negative effect upon [protected] persons."); *id.* pt. 7-12, at 7-20 to 7-23 (identifying "overt discrimination, disparate treatment, and disparate impact" as types of illegal discrimination under the FHA); *id.* pt. 5-10-A-4, at 5-57 (facially neutral land-use ordinances may violate the FHA if they have a "disparate impact").

reflected in these various HUD pronouncements is entitled to *Skidmore* deference. *Mead*, 533 U.S. at 227-28.

Other agencies have also interpreted the FHA to include a disparate impact cause of action. As part of its enforcement responsibilities under the FHA,[16] the Justice Department has often successfully urged the lower courts to adopt an impact standard in FHA cases, particularly those dealing with exclusionary land-use decisions by local governments. See, *e.g.*, *Yonkers*, 837 F.2d at 1217; *City of Parma*, 661 F.2d at 564-65, 576; *United States* v. *Mitchell*, 580 F.2d 789, 791-92 (5th Cir. 1978); *City of Black Jack*, 508 F.2d at 1184-85. Moreover, in 1994, HUD, Justice, and eight other federal agencies that regulate financial institutions, including the Federal Reserve Board and the Office of the Comptroller of the Currency, adopted a joint "Policy Statement on Discrimination in Lending" recognizing that proof of disparate impact is sufficient to establish a violation of the FHA. See 59 Fed. Reg. 18266, 18269 (Apr. 15, 1994). Although these agencies lack the interstitial lawmaking power delegated to the Secretary of HUD, their consistent views are also entitled to *Skidmore* deference, and confirm the propriety of the Secretary's determination that the FHA provides a disparate impact cause of action.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

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[16] *See, e.g.*, 42 U.S.C. § 3614 (Attorney General may file "pattern or practice" and "general public importance" cases); *id.* § 3610(g)(2)(C) (requiring HUD to refer administrative complaints that involve zoning or other land-use laws or ordinances to the Attorney General for appropriate action under § 3614).

Respectfully submitted,

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